IN THE SUPREME COURT OF THE UNITED STATES.

George C. Rankin, who succeeded George H. Higgins, Receiver of the Keystone National Bank of Erie, Plaintiff in Error,

vs.

The Fidelity Insurance, Trust and Safe Deposit Company, Defendant in Error.

October Term, 1902.
No. 178.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PAPER BOOK OF THE DEFENDANT IN ERROR.

COUNTER STATEMENT.

The undisputed facts in the case have not been stated in the paper book of the plaintiff in error with the fullness which is needed to give a clear understanding of the questions of law raised by the assignments of error. They are as follows:—

On November 15th, 1890, the defendant, the Fidelity Insurance, Trust and Safe Deposit Company, made a loan of $15,000 to the firm of Delamater & Co., of Meadville. (Record, pages 28–29.) This loan was in renewal of prior loans. For this loan Delamater & Co. gave to the Fidelity Company their sixty-day note, dated November 15th, 1890 (Record, page 102), and as collateral to secure the payment of the note, deposited two hundred and thirty shares of the capital stock of the Keystone National Bank of Erie, each share being of the

par value of $100. The shares thus deposited as collateral were in four certificates, one being for one hundred shares in the name of George B. Delamater, one for thirty shares in the name of George B. Delamater, and two for fifty each in the name of George W. Delamater. (Record, page 23.)

With the certificates of stock thus deposited, powers of attorney were deposited with the Fidelity Company, signed by George B. Delamater and George W. Delamater, respectively, in blank. These documents were in the usual form, containing a bill of sale, and also power of attorney to transfer, the name both of the transferee and attorney being blank, as is the custom.

On December 5th, 1890, the firm of Delamater & Co. made a general assignment for the benefit of creditors to George W. Haskins and John O. McClintock. (Record, page 63.)

On January 10th, 1891, The Fidelity Company having been informed of the assignment by Delamater & Co. for the benefit of creditors, sent to the Keystone Bank of Erie the original certificates deposited as collateral, and requested the bank to transfer the shares into the name of W. W. Hand. (Record, page 31.) W. W. Hand was a clerk in the employ of the Fidelity Company.

The Keystone Bank transferred the shares as requested into the name of W. W. Hand, and transmitted the new certificates to The Fidelity Company, who acknowledged receipt of the same in a letter of January 19th, 1891, saying (Record, page 31):—

"PHILADELPHIA, Jany. 19, 1891.

"*Keystone Natl. Bank, Erie, Penna.*

"GENTLEMEN: Your favor of the 17th inst. received enclosing certfs. for 230 shares of the bank stock registered in the name of W. W. Hand. We would like to have a bid for the stock if you know of a purchaser.

"Yours truly,

"CHAS. ATHERTON,
"*Treas'r.*"

The certificates issued in the name of W. W. Hand, as appears from the stock books of the corporation were dated January 15th, 1891. There was no receipt for the same on the stub of the stock book, but a memorandum thereon in the handwriting of the clerk of the Keystone Bank, as follows: "Sent to the Fidelity Insurance, Trust and Safe Deposit Company, Philadelphia, Pa., 1/17/91." (Record, page 22.)

On March 16th, 1892, the Comptroller of the Currency, finding that the capital of the bank was impaired, ordered an assessment of twenty-five per cent. on the capital of the bank. (Record stipulation, page 17.) The Fidelity Company, holding the shares of the bank as collateral, advanced the amount of this assessment thereon. This assessment on these shares amounted to $5750, and this amount was charged by the Fidelity Company on its books to Delamater & Co. as an increase of the loan. (Record, page 99.)

On December 2d, 1892, by order of the Comptroller of the Currency, acting pursuant to the provisions of section 5143, Revised Statutes of the United States, the capital stock of the bank was reduced from $250,000 to $150,000, divided into fifteen hundred shares of $100 each. By this reduction each prior holder of twenty-five shares received but fifteen shares.

Thereupon on January 24th, 1893, the Fidelity Company, as the holder of the certificates for two hundred and thirty shares which had been deposited with them as collateral for the loan of Delamater & Co., sent the certificates for these shares for exchange into the reduced number of shares. (Record, page 32):—

"PHILADELPHIA, Jany. 24th, 1893.

"*Keystone National Bank of Erie, Pa.*

"GENTLEMEN:—Enclosed you will find certificates 180–181 each 100 shares, No. 183, 30 shares of your Bank, to be exchanged in accordance with resolution of stockholders December 2d, 1892. You will please return the new certificates to this address.

"Very truly yours,

"CHAS. ATHERTON,

"*Treas'r.*"

The bank received these certificates, and on February 7th, 1893, returned to the Fidelity Company a certificate for one hundred and seventy-two and a half shares in the name of W. W. Hand.

The receipt of this certificate the Fidelity Company acknowledged in a letter of February 10th, 1893, as follows (Record, page 32):—

"PHILADELPHIA, Feb. 10, 1893.

"*F. V. Kepler, Esq., Cashier Keystone Natl. Bank, Erie, Penna.*

"DEAR SIR:—Yours of the 7th received with certificate for 172½ shares new stock of your bank.

"Very truly yours,

"CHAS. ATHERTON,
"*Treas'r.*"

On March 20th, 1894, Mr. Atherton, the vice-president of the Fidelity Company, addressed a letter to the bank, making inquiry as to any sales of this stock, which reads as follows (Record, page 32):—

"PHILADELPHIA, March 20, 1894.

"*Matthew Griswold Prest. Keystone National Bank, Erie, Pa.*

"DEAR SIR:—This Company holds 172½ shares of your bank registered in the name of W. W. Hand. We would like you to send us copy of your last statement and any other information in regard to the business of the Bank, and as to whether there is any sales of stock, and what price. We would like to sell our holdings, if marketable.

"Yours truly,

"CHAS. ATHERTON,
"*Vice-Prest.*"

No reply was received to this letter, and on April 4th Mr. Atherton wrote a further letter, which read as follows (Record, page 108):—

"*Mr. Matthew Griswold, Pres. Keystone National Bank, Erie, Pa.*

"DEAR SIR:—You will please answer my letter of March 20th asking for information in regard to the business of your bank. We would like you to send us a copy of your last statement published, also would like to know if there has been any sales of stock within the last six months, or what price was the last sold at. As we have a loan of $22,000 depending on the value of 172½ shares we desire the above information.

"Very truly yours,

"CHARLES ATHERTON,
"*Vice-President.*"

It will be perceived that while in the letter of March 20th, 1894, there was no information given to the Keystone National Bank of the circumstances under which the Fidelity Company held these 172½ shares registered in the name of W. W. Hand, in the second letter, of April 4th, 1894, it was distinctly stated that a loan of $22,000 depended on their value.

To the second letter above referred to, J. W. Kepler, the cashier of the Erie Bank, replied under date of April 7th, 1894 (Record, page 107), apologizing for the delay in answering and stating that there had been no change in the price of the stock.

There seems to have been no further correspondence between the Fidelity Company and the Keystone Bank until the Spring of 1897.

On March 17th, 1897, Mr. Atherton, vice-president of the Fidelity, wrote to the cashier of the Keystone Bank as follows (Record, page 33):—

"PHILADELPHIA, March 17, 1897.

"*F. V. Kepler, Esq., Cashier The Keystone Natl. Bank, Erie, Pa.*

"DEAR SIR:—This company owns 172½ shares of the stock of your Bank registered in the name of W. W. Hand. We should be much obliged for any information you can give us in regard to the business of the bank, and a copy of your last statement to the Comptroller. Do you know of any sales of the stock, and at what price sold? We are anxious to sell the stock to close an account. If you can put us in the way of finding a customer, we will pay the usual commission.

"Yours truly,

"CHARLES ATHERTON,
"*Vice Prest.*"

It appearing that Mr. Kepler has ceased to hold the office of cashier, on March 20th, 1897, Mr. Atherton wrote a letter in similar language to T. M. Lamb, who had succeeded Mr. Kepler as cashier. (Record, page 108.)

No answer having been received to this letter a further letter was written under date of April 8th, 1897, as follows:—

"*F. M. Lamb, Esq., Cashier Keystone National Bank, Erie, Pa.*

"DEAR SIR:—March 17th, I addressed a note to Mr. F. V. Kepler, supposing he was still cashier of your bank. He said he was not connected with the bank and referred me to you. On March 20th, I wrote you this company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand. Since we have held the stock we paid an assessment and the number of shares reduced. We have no knowledge of the bank affairs. We would like to have a copy of the last Statement to the Comptroller and any other information in regard to the business of the bank you

will give us. Are there any market for the stock and at what price? We are anxious to sell this stock to close an account. If you can put us in the way of selling the stock we will pay a commission.

"Yours truly,

"CHARLES ATHERTON,
"*V. P.*"

In this last letter it will be perceived that there is again a reference to the fact that the stock was held as collateral as it was the desire of the bank to sell it "to close an account."

To this last letter Mr. Lamb, as cashier of the Keystone Bank, replied under date of April 14th (Record, page 107):—

"*Charles Atherton, Esq., V. P. Phila., Pa.*

"Enclosed find report of this bank March 9th, 1897. As regards sale of the stock, I think there would be a poor chance at the present time. Since our trouble of several years ago we have made no dividends, the condition of business being such that it has not been advisable to do so. Business is picking up in this locality. Should it continue we will get our share of it and be able to make dividends. Now then will be a chance for a sale of stock. I will keep this matter in mind and should I find a chance for a sale will let you know. I have been out of the City, thus the delay in answering yours of the 8th.

"Respectfully yours,

"T. W. LAMB,
"*Cashier.*"

On June 20th, 1897, the Keystone National Bank of Erie clased its doors (Record, page 109), and on July 26th, 1897, the Comptroller of the Currency appointed a Receiver of the Bank.

On November 3d, 1897, the Comptroller ordered an assessment of one hundred per cent. on the stockholders. (Record, page 18.)

This action was brought against the Fidelity Insurance, Trust and Safe Deposit Company to recover this assessment of $17,250 on the one hundred and seventy-two and one-half shares registered in the name of W. W. Hand.

The question which was submitted to the jury at the trial was, as stated in the charge of the court:—

> "Whether before the Keystone National Bank failed, the defendant company was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock. Whether the stock had become theirs in the sense in which we use in ordinary speech the word 'owner' or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

And again, the learned Judge said:—

> "The whole subject as I regard it—for the present at least—is a question of fact, and that question I repeat is whether the defendant company, The Fidelity Trust Company, was at the time when this Bank went into the hands of the Receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters."

Upon the issue thus submitted, the jury found a verdict for the defendant. We are therefore justified in asserting that the jury have found specifically as a fact, that at the date of the failure of the Keystone National Bank of Erie, these one hundred and seventy-two and one-half shares of stock registered in the name of W. W. Hand were held by the Fidelity Company, the defendant, as collateral security for the loan made to Delamater & Co. on November 15th, 1890, and that the equity, if any, in said shares, over and above the loan was the property of Delamater & Co. or their assignees.

A motion for a new trial having been made, the learned judge who tried the case, in an opinion (Record, pages 126, 127), held that upon the facts which must be regarded as established by the verdict the case came within the rule settled by the Supreme Court of the United States in Anderson *vs* The Philadelphia Warehouse Company, 111 U. S., 479, and reaffirmed in Pauly *vs.* The Loan Company, 165 U. S., 606.

The plaintiff having taken a writ of error to the Circuit Court of Appeals for the Third Circuit, that court, composed of Acheson, Dallas, and Gray, Circuit Judges, in an opinion by Judge Acheson (Record, page 141), affirmed the judgment.

BRIEF OF ARGUMENT.

The action of the learned judge at the trial was so clearly in accordance with the established current of authority that it is difficult to present an argument without repeating what seems to be well-settled law.

Prior to Anderson *vs.* Warehouse Company, 111 U. S., 479, the *status* of a lender taking shares of stock in a national bank as collateral, and causing those shares to be transferred into the name of a clerk or employee of the lender, might have been open to question, but all doubts previously existing were removed by an opinion of Mr. Chief Justice Waite, which has never since been questioned.

In that case, Blumer & Co. obtained a loan from the Philadelphia Warehouse Company, and among other collaterals deposited two hundred and fifty shares of the First National Bank of Allentown. The warehouse company caused the shares to be transferred, and a new certificate was issued in the name of T. Charlton Henry, president of the warehouse company. About one week thereafter, the facts coming to the notice of the board of directors of the warehouse company, it was deemed inadvisable to have the shares registered in the name of their president, and they caused the shares to be again transferred and new certificates to be issued in the name

of Dennis McCloskey, an irresponsible person, a porter in the employ of the warehouse company. There was a correspondence in evidence showing that the transfer to the irresponsible porter was because the warehouse company did not wish to assume liability as a stockholder.

Upon these facts Chief Justice Waite delivered an opinion, as follows:—

> "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock, is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only; and that if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. National Bank *vs.* Case, 99 U. S., 628; Bowden *vs.* Johnson, 107 U. S., 251. It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder, but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner."

In the case just quoted, as in the case before the court, there was no question of impending insolvency. In each case the shares stood in the name of the clerk for about seven years intervening between the transfer and the failure of the bank.

In this way the case is distinguishable from Bowden *vs.* Johnson, 107 U. S., 251:—

> "Where the holder of shares of stock in a national bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person, with the design of substituting the

> latter in his place and thus escaping the individual liability imposed by the provisions of section 12 of the Act of June 3d, 1864, c. 106, and transfers his shares to such person, the transaction is a fraud on the creditors of the bank, and the liability of the transferrer to them is not thereby affected."

The case is also distinguishable from National Bank *vs.* Case, 99 U. S., 629, where

> "A party who, by way of pledge or collateral security for a loan of money, accepts stock of a national bank, which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock with the understanding that at his request it shall be retransferred."

The opinion of the court below is also in accord with the ruling of the Circuit Court of Appeals for the Second Circuit in National Park Bank *vs.* Harman, 79 Fed. Rep., 891. In that case the Park Bank made a loan to Christie and Janney, and received shares of stock in the Stock Growers' National Bank standing in the name of one Stebbins; blank powers of attorney accompanied the certificates. The Park Bank caused the certificates to be transferred into the name of Holbrook, a clerk in their employ, who was irresponsible, and had no interest in the transaction other than to hold the shares for the protection of the bank. The court by Wallace, Circuit Judge, said:—

> "The adjudications of the Supreme Court are controlling authority for several propositions applicable to the case in hand, which are as follows: (1.) The real owner of the shares of the capital stock of a national banking association may in every case be treated as a shareholder within the

meaning of section 5151. (2.) Any person who holds himself out as the owner of the shares, by allowing himself to appear as the registered owner thereof upon the books of the banking association, may likewise be treated as a shareholder within the meaning of that section. (3.) If the real owner of the shares transfers them to another person, or causes them to be placed on the books of the banking association in the name of another person, with the intent simply to evade the responsibilities imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed. (4.) If a person receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as a security for the debt due from the real owner to the creditor—doing so in good faith, and for the purpose only of securing payment of that debt without incurring the responsibility of a shareholder—he will not be treated as a shareholder within the meaning of section 5151. The case of Pauly *vs.* Trust Co. (recently decided by the Supreme Court), 17 Supreme Court, 565, after reviewing previous decisions of the Supreme Court upon the general question, affirms the latter proposition.

In the present case the defendant never became the owner of the shares, but remained, as it always had been, merely the pledgee thereof, and, as was pointed out by the opinion in Pauly *vs.* Trust Co., could not become the owner by selling

the shares to itself because of its fiduciary obligation to exercise the right of sale for the benefit of the pledgors."

This ruling of the Circuit Court of Appeals was affirmed in 172 U. S., 644:—

> *Per Curiam:* "Judgment affirmed with costs, on the authority of Pauly *vs.* State Loan and Trust Co., 165 U. S., 606."

In Wilson *vs.* The Merchants Loan & Trust Company of Chicago, 98 Fed., 688, it was held that

> "A pledgee of stock of a national bank with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security without intending to assume liability as a stockholder, cannot be treated as one and subjected to an assessment under No. 5151 Revised Statutes, on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt."

So, also, in Robinson *vs.* The Bank, 94 Fed. Rep., 964, the Circuit Court of Appeals for the Second Circuit held that a pledgee of stock in a National bank who sells it in accordance with the terms of the pledge, and becomes the purchaser, but never has it transferred on the books of the bank into its own name, is not liable for an assessment under section 5151 of the Revised Statutes.

In Matteson *vs.* Dent, 176 U. S., 521, Mr. Justice White recites the general rules controlling the enforcement of this liability as follows:—

> "As a general rule, the legal owner of stock in a national banking association—that is, the one in whose name stock stands on the books of the association—remains liable for an assessment so

long as the stock is allowed to stand in his name on the books, and, consequently, although the registered owner may have made a transfer to another person, unless it has been accomplished by a transfer on the books of registry of the association, such registered owner remains liable for contributions in case of the insolvency of the bank.

"The exceptions to this general rule so far as established by decisions of this court are: (1.) That where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded, and the real owner he held liable. (2.) That where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, those acts will operate a transfer on the books, and extinguish the liability, as stockholder, of the transferrer. (3.) Where stock was transferred in pledge, and the pledgee for the purpose of protecting his contract caused the stock to be put in his name as pledgee, and a registry did not amount to a transfer to the pledgee as owner."

And in Pauly *vs.* The Trust Company, 165 U. S., 606, the general rules applicable are fully stated as follows:—

"A creditor who receives from his debtor a transfer of shares in a national bank as security for his debt, and who surrenders the certificates to the bank, and takes out new ones in his own name, in which he is described as pledgee, and holds them afterwards in good faith as such pledgee and as collateral security for the payment of his debt, is not a shareholder, subject to the personal liability imposed upon shareholders by Revised Statute, section 5151.

"If one receives shares of the stock of a national banking association as collateral security to

him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibility of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151."

And Mr. Justice Harlan, at page 621, delivers an instructive opinion :—

"Does the statute, in letter or spirit, require that the word 'pledgee' appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the transferee? The statute requires that there shall be kept, at all times, in the office where the business of a national banking association is transacted, and subject, during business hours, to the inspection of shareholders and creditors of the association, as well as of officers authorized to assess taxes under State authority, a full and correct list of the names and residences of all the shareholders of the association, and of the number of shares held by each. Section 5210. Manifestly one, if not the principal, object of this requirement was to give creditors of the association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts,

debts, and engagements. Referring to this provision this court said, in Waite *vs.* Dowley, 94 U. S., 527, 534, that the Act of Congress 'was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank.' And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, 'in addition to the amount invested in such shares.' The word 'invested' plainly has reference to those who originally or by subsequent purchase became the real owners of the stock, and cannot refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as collateral security for debts or obligations already or to be contracted.

"It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as the true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a Receiver. But this is upon the ground that by allowing his name to appear upon the stock lists as owner he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value. But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued were not in fact,

and did not assume to be, the owner of the shares represented by them, but was and assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation. Upon inspecting the stock registry or any list of shareholders or of transfers kept by the bank, creditors will know that they cannot regard a pledgee as actual owner. If the certificates in question had been extended so as to give the name of the pledgor, it would not be supposed that, upon any principle of justice or upon grounds of public policy, the pledgee could have been held to the liability imposed by section 5151 upon shareholders."

This review of the decisions shows that upon the main question the court below was clearly in accord with the current of authority. It only remains to review the twenty-one assignments of error to show that there is nothing in detail which requires a reversal.

We will take up the several assignments of error in their order :—

(1.) Record, page 149. In this assignment of error there is a commingling of that which occurred as shown by the bill of exceptions, with a mass of argument, which renders it difficult to determine just what the question before the court is. The assignment, however, is based upon the action of the court in refusing to admit certain evidence as shown in Record, pages 20, 21. From the bill of exceptions it appears that George H. Higgins, the Receiver of the bank, having been called, produced stock ledger of the bank. On page 96 of the ledger, written in ink, is the following: "1891—W. W. Hand, February 1, 1893, 25% assessment, $5,750. New stock, $17,250. Total $23,000." On the credit side of the ledger is "1891—January 15, 230 shares of stock, $23,000. Total, $23,000." In pencil memorandum ——

"MR. DALE:—I object to the offer of the pencil memorandum."

The witness then testified the book was now in the condition in which it had been handed to him by his predecessor receiver, and that no alterations had been made by him in it. The offer of the pencil memorandum is then renewed, Page 21.

"MR. DALE:—I object to the offer of the memorandum which is in pencil. At the top of the page in pencil are these words: 'Fidelity Trust and Safe Deposit Company, Philadelphia.' I object to that upon the ground that a pencil memorandum, entered upon the stock ledger of a corporation, over the name of the person who purports to be the registered stockholder, is not evidence tending to show that the person or corporation named in the pencil memorandum as the Fidelity Company—even though the Receiver of that bank may with entire correctness testify that the book was in that condition when it came into his possession—it is something which does not tend to show anything binding on us.

"MR. JOHNSON:—All I have to show is that the books came from the proper custody, and having shown that, whatever the books bear upon their face, to the extent they are evidence, is evidence. It is not like the producing of a contract which emanated from some other person. I am producing our own books, and producing them just as the custodian receives them.

THE COURT:—What effect do you say should be given to the pencil memorandums?

"MR. JOHNSON:—Whatever effect would appear from that entry upon the book.

"THE COURT:—What particular inference are you seeking to draw from it?

"MR. JOHNSON:—To show that, upon the books, appeared the interest of the Fidelity Company in that stock; that in connection with the name of

Hand was also that of the Fidelity Company, and that there was not an unequivocal admission on our books of W. W. Hand without an interest in someone else.

"THE COURT:—I understand the purpose of the offer is to show the Fidelity Company's title to the stock.

"MR. JOHNSON:—It is for the purpose of showing exactly what our books declare with reference to the stock and the Fidelity Company's connection with it.

THE COURT:—It is on that point, and you intend to draw the inference, in part from this memorandum, that the Fidelity Company is the owner of the stock.

"MR. JOHNSON:—I do not think I could do that, but I do want to exclude the inference that upon our books we made an unequivocal admission that no one but Hand was interested in it. There is a difference between that and my adducing from it affirmative ownership—that I am going to prove in a different way—and when I offer my books I offer them for the purpose of having them go for whatever is on them."

"MR. DALE:—I object to the offer of that entry upon the ground that entries in the books of the corporation, *per se*, are not evidence to establish the fact that any particular person is a stockholder. There may be entries in the books, and if it be shown that the person charged as a stockholder has had either direct or inferential notice, then the entry may be admissible. It may be competent to show the stub entry book, or their stock ledger, but only entries in the stock ledger which are directly pertinent to that which appears upon the certificate itself are competent evidence. Entries in the corporation books as such do not bind the stockholders. Therefore, having called for the certificate in the name of W. W. Hand, they pro-

duce a stock ledger, and entries kept in the regular course of business ; part of the regular chain of entries relating to that certificate I do not object to, but when there simply appears on that page a pencil memorandum which is no proper part of the chain of entries, then I do object to it; I do not know what inference will be sought to be drawn from it, but I object to it as something which we in no sense could be chargeable with.

"THE COURT:—For the present we will exclude this memorandum, with liberty to the plaintiff to renew the offer at a future stage of the case.

"MR. JOHNSON:—What does your Honor do with the books themselves? They have been offered in evidence without objection, and I was having him read from them.

"MR. DALE:—When a book is offered in evidence every entry which is part of the book as regularly kept is admitted.

"MR. JOHNSON:—All I want is that the record shall cut down or limit the admission of the books, so that I may have my record straight.

"THE COURT:—I exclude this testimony for the present, because I do not yet see any sufficient connection to make this entry evidence against the defendant. The mere fact that the name of the Fidelity Company is on this page is not sufficient to show that it is the owner of the stock. *Non constat*, if for some reason some notice was to be sent to them, they might have been trustees of this stock, or there might be other reasons why the entry is there. Later in the case it may become pertinent evidence. In the present state of the proof we will exclude this memorandum.

"(Exception noted for plaintiff.)"

From this extract from the bill of exceptions it will be seen that the first assignment of error entirely fails to present the question upon which the court acted. But waiving all technical questions, the court was clearly right.

The books of a corporation in themselves are not evidence against persons charged as stockholders to establish the fact of their ownership of stock.

Sigua Iron Company *vs.* Green, 104 Fed. Rep., 854; 88 Fed., 203;

Carey *vs.* Williams, 79 Fed., 906.

If, however, by evidence *aliunde* the defendant is shown to have received the certificate, the certificate book and its stubs and stock ledger may be admitted to show the details of the ownership, but under no circumstances does the rule admitting the books of the corporation as evidence against stockholders apply to anything on those books other than the regular entries, and an unexplained pencil memorandum whereby the name of the Fidelity Insurance, Trust and Safe Deposit Company was written on the same page in which W. W. Hand appeared to have been regularly entered as the stockholder was not competent as tending to prove a legal ownership of that stock by the Fidelity Company. The relationship of the Fidelity Company to the transaction was fully explained by the correspondence and the testimony of witnesses. To have admitted this pencil memorandum would have been error, as introducing something into the case calculated to mislead the jury.

(2.) Page 150. This specification also relates to the admission of certain evidence, and the assignment is not in accordance with the rules of the Circuit Court of Appeals for the Third Circuit or the rules of this court.

Rule 11, Circuit Court of Appeals:—

> "*Assignment of Errors.*—The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of

evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to *totidem verbis*, whether it be in instructions given or instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Which is a paraphrase of rule 21, pl. 2 (2), of this court.

It evidently refers, however, to the matters referred to on page 28, bill of exceptions. The question, the objection, the answer, and the ruling of the court were as follows:—

"By MR. DALE:—

"Q. When was the loan to Delamater & Company made? * * *

"Q. The loan for which the shares were given to which you have referred?

"MR. JOHNSON:—I object to that, because the witness testified he had no personal knowledge of the matter; that he never came in contact with the Delamaters; that he learned only from the officers of the institution, and therefore he is unable to testify to any fact as to the date.

"A. Not personal knowledge, from personal contact with Mr. Delamater; but I have every knowledge of it.

"THE COURT:—I understand the witness to testify that in the usual course of business he received the notes and collaterals with reference to the loan in question, and made certain entries in the books with reference thereto; also, that certain subsequent correspondence was had with reference to the loan. I think, therefore, he is

competent to answer the question as to when the loan was made.

"(Exception noted for plaintiff.)"

This extract from the bill of exceptions shows that the ruling of the court was based on the antecedent evidence of the witness, which showed that he had that personal knowledge of the transaction made as enabled him to state the date when the loan was made, even though he had no recollection of personally talking with Mr. Delamater on the subject.

(3.) Record page 150 relates to the action of the court in excluding certain testimony contained in the deposition of J. O. McClintock. The offer, the objection, and the rulings thereon will be found at pages 68, 69, and 70 of the bill of exceptions. It will be perceived that the court below went to the full limit in admitting the evidence offered for the plaintiff. It permitted the plaintiff to show that the assignees filed their account in the Common Pleas of Crawford County, on July 13th, 1896, and having charged themselves in the account which they filed as follows:—

"Equities in stocks and bonds pledged as collateral on loan unadjusted as follows: (*a*) $23,000 stock of the Keystone National Bank of Erie, pledged for a loan of $15,000. Appraised at $8,000."

That the assignees has credited these as follows:—

"Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000 charged at $8.000."

and excluded proof that in this account the assignees had made this further statement:—

"Said stock having been converted by the holder of the note, and said stock having been assessed to the amount of twenty-five per cent.

of its face value, did not sell for enough to pay the debt for which it was pledged."

In excluding this memorandum entered by the assignees of Delamater & Co. in the account filed by them the court below was clearly right. It was a mere assertion of facts made by these assignees without the knowledge of the Fidelity Company, the defendant. There was no evidence that the attention of the Fidelity Company had ever been called to it, or that the Fidelity Company had in any manner acquiesced in it. It was a pure assertion of a stranger not made in the presence of either litigant, and as such had no probative force against the Fidelity Company. The language of the learned judge below in excluding this offer fully vindicates his action.

(4.) Record, page 151, relates to the action of the court below (Bill of Exceptions, page 70) in excluding proof that the Common Pleas of Crawford County had confirmed the account of the assignees. This also was *res inter alios acta*, and it was also inadmissible to prove the action of the Court of Common Pleas of Crawford County by the oral testimony of Mr. Haskins.

(5.) Record, page 151, needs no particular discussion. It refers to nothing in the record which this court can take notice of. It is simply an assertion that upon all the evidence the verdict should have been for the plaintiff. That proposition need not be here discussed.

(6.) Record, page 151.—The same remark applies to this assignment of error, concerning which we shall say nothing more.

(7.) Record, page 152, relates to the refusal of the plaintiff's first point. In this point the plaintiff undertook to state his version of the facts, and upon the finding of those facts by the jury to ask for a binding instruction. It assumes that from certain facts thus marshalled the conclusion inevitably follows that the Fidelity Company at the time of the closing of the

bank was the absolute owner of these shares. The learned judge who tried the case submitted that question to the jury under all the facts of the case, and directed the mind of the jury clearly and specifically to the issue to be determined by the jury. The point thus submitted by the plaintiff in its inadequate presentation of all the facts, and in its clearly inaccurate presentation of others, if it had been affirmed, would have led the jury into error. The conclusion that the Fidelity Company was the absolute owner was not the certain consequence of the existence of the suggested facts. The inaccuracy of the point is particularly disclosed in that part of it in which it assumes that in 1895 "the assignees of Delamaters called at the office of the corporation defendant, and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares." An examination of the deposition in which Mr. Haskins, one of the assignees (Record, page 83), stated what took place at the Fidelity Company, shows that no such claim of absolute ownership was made to the assignee on behalf of the Fidelity. Mr. Haskins' version of what took place is as follows:—

> "We went into the office of the Fidelity Insurance, Trust and Safe Deposit Company, and made known our business stating that we wished to make such adjustment as we could, or some adjustment if possible, with reference to the stock of the Keystone National Bank which they held in payment of the note. Our proposition was to turn over stock at its face value to the amount of the note and have them turn over to us the excess and this gentleman to whom we had been referred and with whom we were holding the conversation informed us that the stock had been transferred and he immediately mentioned the name of Mr. Hand and said he was an employee of the company and that they could not entertain any such proposition and said that an assessment had been levied on the stock which they had paid and that the stock had been reduced and they

did not think the stock worth the value of the note. They did not turn any of it over to us." * * * (Page 84.)

"Q. When you proposed to withdraw a part of the collateral, was not the refusal to permit this based upon the ground that the value of the collateral did not warrant such a withdrawal?

"A. Partly. But that is the time that the answer was made that it had been transferred. When we made that proposition, the answer was that the stock had been transferred and he added, as I said a moment ago, the value of the stock, in his opinion, was not equal to the face of the note."

This deposition, offered by the plaintiff, clearly shows not any claim of ownership by the Fidelity Company when the accounts of the assignees were settled, but an assertion that the collateral was not equal in value to the debt, and that consequently the Fidelity Company declined to accept stock at par and deliver the excess to the assignees.

This information may have fully justified the assignee in claiming credit for the excess of $8000 with which they had been originally charged, but it does not tend to show that the equity, if in fact the value was there, was extinguished and if the Keystone Bank had not failed in 1897, and through good business the stock had increased, no one can pretend that this evidence would have tended to show that the Fidelity Company had become owner so as to have excluded the right of Delamater & Company and their assignees to the benefit of any excess after paying debt and interest.

(8.) Pl. 153, relates to the refusal of the plaintiff's second point. This point is based upon the idea that the act of the Fidelity Company in transferring the certificates into the name of Hand without express evidence of authority thereunto sanctioning the transfer, coupled with its subsequent action in advancing the assessment and submitting to the reduction of the capital, was equivalent to a conversion.

It is proper to consider these points separately. The transfer of the shares into the name of Hand was authorized by the very terms of the power of attorney which Delamater & Co. gave to the bank with the certificates. These powers of attorney were made by the then registered owners of the shares the name of the transferree and the name of the attorney was left blank to enable the pledgee to fill the same in and procure the transfer at pledgee's will. When shares of stock are pledged, the pledgee has the right, from the nature of the transaction, and without any specific permission given by the pledgor, to complete the legal title adverse to that of the pledgor. It is true that such legal title is subject to the pledgor's right of redemption, but all the analogies of the law as well as the custom of business sanction the act of the pledgee, in procuring a transfer of the shares out of the name of the pledgor, and when the pledgor delivered the powers in blank, not limiting the name to that of the pledgee personally, the transaction upon its face imports authority to use any name the pledgee may select; the whole transaction, however, always being subject to the pledgor's right of redemption and the pledgee's responsibility to return the collateral upon the payment of the debt. This view is recognized by the learned judge who tried the case in his opinion on the motion for a new trial:—

> "The case now before me comes precisely within this rule, except that there is no proof of an express agreement that the shares transferred to Hand on the books of the bank should be held as security for the debt due from the Delamaters, the pledgors and the real owners of the shares, to the Fidelity Company, the creditor and pledgee. It does not seem to me, however, that this difference is important, because the jury have found as a fact that the shares were always thus held by Hand as security, and that when the Fidelity Company caused the name of Hand to be inserted in the blank powers of attorney signed by the pledg-

ors, the company did so with the intention, not of converting the shares to their own purposes or of treating them as if the company was the real owner, but solely with the intention that Hand should hold them as trustee for all the parties concerned. This being the fact, and Hand's title being thus in reality a title in trust for both parties to the pledge, I think it should make no difference that the pledgors did not formally agree that the shares should be transferred. Even if they had refused to agree to the transfer, they have suffered no harm or injury, and it is difficult to see upon what ground they could be heard to complain. They are not complaining or seeking relief—certainly not in this suit to which they are not parties—but even if they themselves were complaining of the transfer because they did not agree to it expressly, I should still adhere to the opinion that I expressed at the trial, namely, that when they indorsed the certificates in blank and delivered them as collateral security to the Fidelity Company to hold as pledgee for the loan, the pledgors thus authorized the company to transfer the certificates to a third person to be held by him in accordance with, but not in opposition to, the terms of the contract of pledge. Hand did hold the shares, as the jury have found, in accordance with the original contract of pledge, and I think therefore that the transfer to him was impliedly authorized by the indorsement in blank and the delivery of the shares to the pledgee."

The other matters of fact relied on to establish a conversion are the payment of the assessment by the Fidelity Company and its submission to the reduction of capital, but these were matters where the Fidelity Company's action was not voluntary. The assessment of twenty-five per cent. and the reduction of the capital were the act of the Comptroller of the Currency. They were the conditions upon which the Keystone

Bank of Erie was permitted to continue in business. The Fidelity Company, holding the shares as collateral, not only by the right of self-interest in protecting the debt due to them, but also as the representative of the ultimate owner, were not only bound but justified in submitting to the action of the Comptroller. Their refusal to do so would have, at that time, destroyed the collateral which they held, and would also have destroyed the shares which they were holding for their debtor. Their action in thus protecting the collateral in no wise evidences an intent to convert.

(9.) Record, page 153, is that the court refused to give a binding instruction for the plaintiff. We shall not discuss this further. Our position on this point is sufficiently sustained by the authorities which we have cited, which were followed by the learned judge at the trial in submitting the issue to the jury.

(10.) Record, page 154, relates to the refusal of the plaintiff's fourth point. In this point there is a further reference to the action of the Fidelity Company in transferring the shares out of the name of Delamater & Co. into the name of Hand without proof of express authority so to do. This we have already discussed under the eighth specification. The authority to make the transfer was distinctly given in the power of attorney accompanying the certificates.

(11.) Record, page 154, to the refusal of the fifth point. There were no facts in evidence to justify the submission of any such point. As to the assertion by the defendant of ownership, the uncontradicted evidence in the case shows that this assertion of ownership was in connection with an accompanying assertion that it held them as collateral. As to whether the Fidelity owned the shares absolutely, or held them as collateral was the issue which the court submitted to the jury. An instruction in the form suggested in the fifth point would have been erroneous.

(12.) Record, page 154, is not in accordance with the rules. It fails to quote that portion of the charge to which exception is made.

> Rule 11 of the Circuit Court of Appeals. * * * When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. * * *

When the language of the court is read it will seem to be unobjectionable:—

> "The whole subject as I regard it — for the present at least — is a question of fact, and that question I repeat is whether the defendant Company, the Fidelity Trust Company, was at the time when this bank went into the hands of the Receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters."

Not only was the court correct in its general apprehension of what the issue in the case was, but it accurately stated the issue of fact for the jury. If there were any controlling questions of law in the case, the charge of the court to the jury was not the place to discuss such questions. Such questions are only properly raised by points, and, if the questions of law are controlling, by binding instructions, but an examination of this particular case shows that no such controlling questions of law arose in it. The instruction of the court was not only fair to the plaintiff in its submission of the issue of fact, but strictly accurate.

(13.) Record, page 154, fails to accurately quote anything which was said by the learned judge to the jury, although it

relates to a subject which was discussed in the charge. See rule of this court, to wit (4). What the judge did say will be found on page 115 of the Record, and was as follows:—

"It has been argued to you by the counsel for the plaintiff — and there is one point upon that subject — that there was no justification for the transfers to Hand without the consent of the Delamaters. I am not able to agree with that statement in its entirety. I think the assignment in blank by the Delamaters and the delivery of the certificates in that condition would be sufficient evidence of consent upon the part of the Delamaters that the stock might be used by the trust company in any way that was consistent with the original contract. It would, of course, give no authority to deal with the stock in any other way; but if there was, as there was undoubtedly, an ordinary collateral loan, this assignment in blank, accompanied by delivery of the certificates in that condition, would in my judgment be sufficient evidence of consent on the part of the Delamaters that the trust company might deal with the stock in any way consistent with that contract. If for any reason satisfactory to themselves they chose to have the stock transferred to the name of another person who was simply to hold the title in conformity with the original transaction until the loan was either paid or the transaction closed in some way, as for example by a sale of the stock under the power in the collateral note, I think, and I so instruct you, that the trust company might do so without any violation of their duty to the Delamaters. I may, indeed, say that this piece of evidence is another illustration like the two that I gave you before. The form of the transaction is not inconsistent with the view urged upon you by defendant, namely, that it was a collateral loan, neither is it incon-

> sistent with the view taken by the other side; and what inference should be drawn from it, I repeat again, is a matter for the jury to determine."

This language of the learned court is very different from the attempted abstract contained in the specification of error, and we are satisfied to quote the language of the charge as its own best vindication.

(14.) Record, page 155, also fails to refer to any specific lauguage used by the court at the trial. So far as it has any reference to the charge, what we have said in reply to the twelfth assignment of error covers all that we wish to say as to the fourteenth.

(15.) Record, page 155, is not covered by any exception taken at the trial, and not having been excepted to at the trial, is not now assignable for error. The only exceptions taken by the plaintiff are found near the foot of page 120, and there is nothing which by any construction covers the matter covered by the fifteenth assignment. If, however, an exception had been taken, the charge was strictly accurate. The court simply stated the rule that upon an issue of fact the burden is upon the plaintiff to satisfy the jury by the fair weight of evidence.

(16.) Record, page 155, fails to refer specifically to any language in the charge, but so far as we are able to judge, it covers the same ground referred to in the thirteenth specification, to which we have already fully referred.

(17.) Record, page 155, is to the affirming defendant's first point. We submit that this point was drawn strictly in accordance with the rules of law adopted by the Supreme Court in the cases which we have fully cited.

(18.) Record, page 155, relates to the affirming of the defendant's second point. As the plaintiff in the trial of the case

had emphasized the fact that in certain letters Mr. Atherton had referred to the Fidelity Company as the "owner" of these shares, it was proper for the court to call to the attention of the jury the fact that in cotemporaneous letters Mr. Atherton had fully explained the fact that their ownership was that of pledgee, and as the word "owner" is in itself a word of uncertain import in law, being used to cover not only absolute ownership, but the qualified ownership of a pledgee, it was right that the jury should have their attention called to these facts.

(19.) Record, page 155, relates to the court's calling the attention of the jury to the proper definition of the word "owner." The accuracy of the court's instruction is shown by reference to definitions from the Century Dictionary and Bouvier's Law Dictionary:—

> "OWNER: One who owns; the rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not; in a general sense, one who has or possesses. When used alone it does not necessarily imply exclusive or absolute ownership. One who holds subject to a mortgage or otherwise has only a qualified fee, is generally termed owner if he has a right to possession." Century Dictionary.
>
> "OWNER: He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right. See 18 S. W. Rep. (Tex.) 578; 21 Or., 339.
>
> "Although there can be but one absolute owner of a thing, there may be a qualified ownership of the same thing by many. Thus, a bailor has the general ownership of the thing bailed, the bailee the special ownership. See Cra. C. C., 83. The right of the absolute owner is more extended than

that of him who has only a qualified ownership; as, for example, the use of the thing. Thus, the absolute owner of an estate, that is, an owner in fee, may cut the wood, demolish the buildings, build new ones, and dig wherever he may deem proper for minerals, stones, plaster, and similar things, which would be considered waste and would not be allowed in a qualified owner of the estate, as a lessee or a tenant for life. The word owner, when used alone, imparts an absolute owner; but it has been held in Ohio that the word owner in the mechanics' lien law of that State, includes the owner of the leasehold as well as of the reversion, on the ground that any other construction would be subversive of the policy and intent of the Statute. 2 Ohio, 123." Bouvier's Law Dictionary.

These quotations show at least the usage in the use of the word "owner," and the qualifications which are annexed to it.

(20.) Record, page 156, relates to the reservation of a point which did the plaintiff no harm. The court refused the defendant's request for binding instructions, and reserved the point. As there was a verdict of the jury on the issue submitted in favor of the defendant, defendant's sixth point was *functus officii.*

(21.) Record, page 156, is irregular. The refusal of a new trial cannot be assigned for error.

On page 156 of the Record it appears that in addition to the assignments of error which were presented to the Circuit Court of Appeals the plaintiff in error seeks to formulate, under the head of third (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (*i*), (*k*), certain propositions of law as reasons for a reversal of the judgment.

We respectfully submit that these are matters which are not properly the subject of consideration upon this writ of

error. Parties are held in this court to a strict recognition of the functions of the court in error in proceedings at law. Abstract and general considerations of the rights of the respective parties have no place here. They who seek to reverse the judgment at law must point specifically to error in the Record. Such error may be found in the admission of evidence, the refusal to admit evidence or inaccurate instructions to the jury. If such error occurred at the trial, he who seeks to take advantage of it must show the error complained of by a proper bill of exceptions incorporated into the Record and subsequently by proper assignments of error bring it to the attention of the higher court.

The matters which appear on pages 156, 157 and 158 of this Record under the nomination of "specifications of error" have no place there.

Having presented to the court our views upon the questions of law involved in this Record, and having called attention to the insufficiency of the several assignments of error, we now ask that the judgment of the Circuit Court and of the Circuit Court of Appeals be affirmed.

RICHARD C. DALE,
For the Defendant in Error.